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No. 82-220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALD L. ARMSTRONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS
OF THE UNITED STATES OF AMERICA

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August 1982.

QUESTIONS PRESENTED

Petitioner Gerald L. Armstrong brought suit alleging that he was systematically misled by authorized or apparently authorized agents of the United States government to believe that he was not eligible for Veteran's Benefits in relation to injuries which he sustained while a Cadet at the United Air Force Academy. The question presented for review pertains to the dismissal of the petitioner's action by the United States Court of Claims on the basis that petitioner could not bring a cause of action based on estoppel against the United States government, to wit:

1. Whether the United States can be estopped from denying benefits to an otherwise eligible citizen, where the citizen is prevented from applying for such benefits due to systematic misrepresentations and affirmative misconduct on the part of agents and employees of the United States.

Index

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. WHETHER THE UNITED STATES CAN BE ESTOPPED FROM DENYING BENEFITS WHERE THE APPLICANT RELIED ON SYSTEMATIC MISREPRESENTATIONS AND AFFIRMATIVE MISCONDUCT OF THE UNITED STATES	5
CONCLUSION	10
Appendix:	
Opinion of the United States Court of Claims	A-1

Table of Authorities

Cases	*Page*
Feres v. United States, 340 U.S. 135 (1950)	5, 9
Immigration & Naturalization Service v. Hibi, 414 U.S. 5 (1973)	6
L'Enfant Plaza v. D. C. Redevelopment, 564 F.2d 515 (D.C. Cir. 1974)	6
Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974)	6
Molton, Allen, & Williams, Inc. v. Harris, 613 F.2d 1176 (D.C. Cir. 1980)	8
Montana v. Kennedy, 366 U.S. 308 (1961)	6
Morris v. Andrus, 593 F.2d 851 (9th Cir. 1978) cert. denied, Morris v. United States, 444 U.S. 863 (1979)	6
Moser v. United States, 341 U.S. 41 (1951)	6
Oil Shale Corp. v. Morton, 370 F. Supp. 108 (Colo. 1973)	8
Oki v. Immigration & Naturalization Service, 598 F.2d 1160 (9th Cir. 1979)	8
Schweiker v. Hansen, 450 U.S. 785 (1980)	5, 6, 9, 10
United States v. Lazy C. Ranch, 481 F.2d 985 (9th Cir. 1973)	6, 8
United States v. Lucienne D'Hotelle, 558 F.2d 37 (1st Cir. 1977)	6
United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978)	6
United States v. Wharton, 514 F.2d 406 (9th Cir. 1975)	8
Yang v. Immigration & Naturalization Service, 574 F.2d 171 (3d Cir. 1978)	8

Table of Authorities (Continued)

Statutes	*Page*
United States Code:	
28 U.S.C. § 1255	*1*
28 U.S.C. § 1346	*5*
28 U.S.C. § 2101(c)	*1*
28 U.S.C. § 2672-2680	*5*
38 U.S.C. § 101(21)(D)	*2, 7*
38 U.S.C. § 331	*2*
38 U.S.C. § 3010(a)	*2, 4*
38 U.S.C. § 3010(b)(1)	*2, 4*

IN THE

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OCTOBER TERM, 1982

GERALD L. ARMSTRONG,

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vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES OF AMERICA

The petitioner Gerald L. Armstrong prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Claims entered on May 11, 1982.

Opinion Below

The opinion of the United States Court of Claims, not published, appears in the Appendix hereto.

Jursidiction

The order of the United States Court of Claims was entered May 11, 1982. This Petition for Writ of Certiorari was filed within ninety days pursuant to 28 U.S.C. § 2101(c). This Court's jursidiction is invoked under 28 U.S.C. § 1255.

Questions Presented

Petitioner Gerald L. Armstrong brought suit alleging that he was systematically misled by authorized or apparently authorized agents of the United States government and told that he was not eligible for Veteran's Benefits in relation to injuries which he sustained while a Cadet at the United Air Force Academy. The question presented for review pertains to the dismissal of the petitioner's action by the United States Court of Claims on the basis that petitioner could not bing a cause of action based on estoppel against the United States government, to wit:

1. Whether the United States can be estopped from denying Veteran's Benefits to an otherwise eligible citizen, where the citizen is prevented from applying for such benefits due to systematic misrepresentations and affirmative misconduct on the part of agents and employees of the United States.

Constitutional and Statutory Provisions Involved

38 U.S.C. § 101(21)(D):

"The term 'active duty' means. . .(D) Service as a cadet at the United States Military, Air Force, or Coast Guard Academy. . ."

38 U.S.C. § 331:

"For disability resulting from personal injuries suffered. . . or disease contracted in line of duty, . . .in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who is discharged or released under conditions other than dishonorable . . .compensation is provided in this subchapter. . . ."

38 U.S.C. 3010(a):

"Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim. . .shall not be earlier than the date of receipt of application therefor."

38 U.S.C. 3010(b)(1):

"The effective date of an award of disability compensation to a veteran shall be the day following the date of his discharge or release if application therefor is received within one year from such date of discharge or release."

Statement of the Case

On June 28, 1973, Gerald L. Armstrong was admitted as a Cadet to the United States Air Force Academy. On April 8, 1976, Mr. Armstrong dislocated his right knee during a judo class at the Academy. Mr. Armstrong was taken to the United States Air Force Academy Hospital, where he was advised that both of his knees needed surgery to realign them and prevent additional dislocations. Mr. Armstrong was told that without such corrective surgery, he would not be physically qualified for commissioning in the United States Air Force upon his graduation from the Academy. Relying upon this assertion of the Air Force doctor, Mr. Armstrong submitted to two operations, one on July 19, 1976, and another on January 10, 1977. These surgeries were not successful, and plaintiff was left with serious and permanent disability to both knees.

On June 1, 1977, Mr. Armstrong graduated from the United States Air Force Academy and was commissioned as a Second Lieutenant in the United States Air Force. On January 17, 1978, because of the disability of his knees, Mr. Armstrong was medically discharged from the United States Air Force. During discharge procedures at Lackland Air Force Base, in January 1978, the plaintiff was informed by at least three authorized or apparently authorized agents of the United States that he was not eligible for disability compensation benefits for the injuries he sustained while a Cadet at the United States Air Force Academy because those injuries were "incurred prior to service."

Mr. Armstrong was told by a person he believed to be supervisor of the Veteran's Administration Office in San Antonio, Texas, that Cadets at the Air Force Academy were not considered members of the active duty armed forces, and, as such, were not protected under provisions providing for disability compensation for injuries. Mr. Armstrong was also told by the Office of the Air Force Legal Counsel that since his injuries were incurred while a Cadet at the Air Force Academy, he was not eligible for disability

benefits. Finally, the United States Air Force Physical Evaluation Board, in its recommended finding, concluded that at the time of his injury, at the United States Air Force Academy, the petitioner was not on active duty.

Relying on this information, Mr. Armstrong did not apply for Veteran's Benefits, and on October 5, 1979, petitioner filed an action in the United States District Court for the District of Colorado, for damages resulting from alleged negligence in performing the surgery to his knees. The United States, in its answer to the complaint, asserted that Mr. Armstrong was barred from suing the United States under the Federal Tort Claims Act, because at the time of his injury he was on active duty with the United States Armed Forces. Mr. Armstrong was, therefore, caught between two different arms of the government, which on the one hand told him that he was not eligible for Veteran's Benefits because he was not on active duty when his injuries occurred, and on the other hand, told him that he could not sue the government because he was on active duty at the time of the injuries. On August 14, 1980, the United States District Court for the District of Colorado ordered the United States to admit or deny that at the time of his injuries the petitioner had been on active duty with the United States Air Force. Only after this order did the government admit that Mr. Armstrong had indeed been on active duty with the United States Air Force.

Under the applicable statutes regarding Veteran's Benefits, Mr. Armstrong was then free to apply for Veteran's Benefits, but they could only be awarded from the date of application. 38 U.S.C. § 3010(a). If Mr. Armstrong had not justifiably relied upon the statements of the agents of the government, he could have filed for such benefits within one year after discharge, and would have been eligible for compensation from the date of discharge. 38 U.S.C. § 3010(b)(1). Mr. Armstrong applied for benefits in July 1981, and was eventually awarded benefits from that date. Mr. Armstrong, because of the active misrepresentations of the government, was thus effectively barred from receiving benefits to which there is no question that he was entitled, for this three-year period.

After the admission by the government that the plaintiff had been on active duty at the time of his injuries, the district court

found that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), applied, which exempts the government from liability under the Federal Tort Claims Act, 28 U.S.C. § 2672-2680, and § 1346. The court held that jurisdiction was proper under 28 U.S.C. § 1346 and allowed plaintiff leave to amend the complaint to state a claim for administrative abuse and equitable estoppel. The case was ordered transferred to the Court of Claims on July 7, 1981, jurisdiction being asserted under 28 U.S.C. § 1346. (The status of an individual defendant, Don H. Bodley, was not resolved by the District Court prior to transfer of the case to the Court of Claims.)

REASONS FOR GRANTING THE WRIT

I. WHETHER THE UNITED STATES CAN BE ESTOPPED FROM DENYING BENEFITS WHERE THE APPLICANT RELIED ON SYSTEMATIC MISREPRESENTATIONS AND AFFIRMATIVE MISCONDUCT OF THE UNITED STATES.

The question of what types of conduct by a government employee or agent may estop the government from denying statutory benefits to a person who is otherwise entitled to receive them, has never been decided by this Honorable Court. In *Schweicker* v. *Hansen*, 450 U.S. 785 (1980), this Court took note of this issue, without deciding, because "affirmative misconduct" on the part of government employees was held not to be involved. The Court thus left open the question of the principle of estoppel being applied against the government where such affirmative misconduct was involved.

Petitioner was systematically misled by employees and agents of the United States government to believe that he was not eligible for Veteran's Benefits because he was not considered to be on "active duty" while a Cadet at the United States Air Force Academy. He was told by two persons whom he reasonably believed to be in positions of authority that he was not eligible. The official findings of the United States Air Force Physical Evaluation Board also stated that he was not considered to have been on active duty. To obtain relief, petitioner was forced to file suit in the United States District Court and it was not until nearly one year after the filing of such suit that the government admitted

that petitioner had indeed been on active duty and was eligible to apply for benefits. The consistent pattern of erroneous information given to the petitioner and the refusal of the government to admit its mistake until ordered by the district court to do so, amount to the affirmative misconduct which was not present in the fact situation underlying *Schweiker* v. *Hansen*, *supra*, and make this case an appropriate one in which this Honorable Court should grant certiorari and fully address the principles of estoppel as applied against the government.

Estoppel against the government has been applied in different ways in many lower court cases. It has been held that while estoppel is rarely a proper theory against the government, there are instances where it would be unconscionable to allow the government to reverse an earlier position. *United States* v. *Lucienne D'Hotelle*, 558 F.2d 37 (1st Cir. 1977). It may be properly applied if government conduct threatens to work serious injustice and if the public's interest would not be unduly damaged by its imposition. *Morris* v. *Andurs*, 593 F.2d 851 (9th Cir. 1978), *cert. denied Morris* v. *United States*, 444 U.S. 863 (1979). *L'Enfant Plaza* v. *D. C. Redevelopment*, 564 F.2d 515 (D.C. Cir. 1977). *Cf. Lytle Co.* v. *Clark*, 491 F.2d 834 (10th Cir. 1974); *United States* v. *Lazy C Ranch*, 481 F.2d 985 (9th Cir. 1973).

Prior to the case of *Schweiker* v. *Hansen*, *supra*, this Honorable Court has also addressed the issue of estoppel a number of times. In *Montana* v. *Kennedy*, 366 U.S. 308 (1961), this Court left open the question of whether the government may be estopped on the basis of affirmative misconduct, while in *Immigration & Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973), this Court found that there was no affirmative conduct, and, thus, no estoppel. The decisions of this Honorable Court and those of numerous lower courts have therefore assumed without deciding that in some circumstances estoppel may be available against the government. *See also Moser* v. *United States*, 341 U.S. 41 (1951).

The elements of estoppel, as noted in *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), are as follows:

> "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has as right to believe it

> is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.... [t]he elements must [also] be read as requiring an affirmative misrepresentation or affirmative concealment of a material fact by the government."

The present case presents facts which fulfill the elements of estoppel and include allegations of affirmative misconduct on the part of the government agents. Mr. Armstrong was specifically told by two different individuals, one a supervisor for the Veteran's Administration, and another an officer in the Office of Legal Counsel for the United States Air Force, that he was not eligible to apply for Veteran's Benefits because he had not been considered on "active duty" while a Cadet at the United States Air Force Academy. Mr. Armstrong was further informed, through the official findings of the United States Air Force Physical Evaluation Board that he was not on active duty at the time of his injuries. Faced with these consistent replies to all of his attempts to find out his rights in connection with disability compensation, Mr. Armstrong could not in any way have been expected to file application for benefits. Based upon the representations made to him by these government employees, Mr. Armstrong justifiably believed that to file an application for Veteran's Benefits would have been a futile act.

The United States Court of Claims should not have dismissed the petitioner's cause of action without giving him the opportunity to prove that the actions of the government in the present case fit the elements of estoppel and affirmative misconduct. This case presents a clear factual question as to the misconduct of the government; the petitioner was told that he was not considered on "active duty" while a Cadet at the United States Air Force Academy, despite a specific statutory provision, 38 U.S.C. § 101(21)(D), which states that Air Force Cadets are to be considered on active duty. The petitioner was ignorant of this fact and reasonably relied upon the representations made to him by at least three separate government employees or agencies.

The misrepresentations to the petitioner concerning his eligibility for Veteran's Benefits was compounded and ratified even after the petitioner filed suit in the United States District Court.

It was only upon the order of the United States District Court that the United States finally admitted that the plaintiff was on active duty. In words of the District Court:

> "In the instant case allegedly defendants repeatedly and systematically misled plaintiff about his active duty status. Since defendants finally admitted that plaintiff was on active duty, it is certainly open to question when they discovered this and whether they actively misled him. Plaintiff relied on defendant's conduct to his detriment. Thus, all of the factors for estoppel are arguably present in the amended complaint and plaintiff has stated a cause of action sufficient to survive dismissal." (Order of the District Court, June 26, 1981).

It has been held that the government is immune from estoppel only where the acts of its agents are erroneous, illegal, or unauthorized. *Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108 (Colo. 1973). When a government agent acts within his authority, the government can be estopped by his actions. *Molton, Allen, & Williams, Inc.* v. *Harris*, 613 F.2d 1176 (D.C. Cir. 1980); *United States* v. *Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States* v. *Lazy C Ranch*, *supra*; *Oil Shale Corp.* v. *Morton*, *supra*. Estoppel must be accompanied by affirmative misconduct on the part of the government. *Oki* v. *Immigration & Naturalization Ser ice*, 598 F.2d 1160 (9th Cir. 1979); *Yang* v. *Immigration & Naturalization Service*, 574 F.2d 171 (3rd Cir. 1978).

The representations made to the petitioner were allegedly made to the petitioner during and immediately following his discharge from the Air Force for medical disability. The findings of the United States Air Force Physical Evaluation Board that the petitioner had not been on active duty at the time of his injury were part of its official recommendation to the Air Force. A Lieutenant Colonel Victor L. Negron from the Air Force Legal Counsel's Office specifically confirmed to the petitioner that since his injuries were incurred while a Cadet at the Air Force Academy, he was not eligible for disability benefits. A supervisor in the Veteran's Administration Office in San Antonio, Texas, told the petitioner the same information, as noted in an affidavit filed by the petitioner in the District Court, although the authority and position of this person, one Bruce D. Gillikin, was disputed by the government in an affidavit filed in the Court of Claims. The

allegations, however, which the dismissal of the case by the Court of Claims prevented the petitioner from even attempting to prove, specifically alleged that the plaintiff was told erroneous information by persons acting in the scope of their employment for the United States, and, thus, were sufficient to fall within the principles of estoppel as they have been delineated by the lower courts.

In the present case, the District Court specifically held that *Schweiker* v. *Hanson* was not controlling, because the plaintiff had alleged affirmative misconduct, and was applying for benefits which were based upon significantly different Congressional policies. While Veteran's Benefits are not a statutory entitlement, they are significantly different than Social Security Benefits. As was noted in *Feres* v. *Unites States*, *supra*, "The relationship between the government and members of its armed forces is 'distinctively federal in character'", at 143, and this principle was one of the primary considerations in that case's holding that servicemen and women on active duty with the armed forces could not bring suit under the Federal Tort Claims Act. Further, what is at issue in the petitioner's case is the payment of disability compensation benefits for injuries which he sustained while an active member of the United States Air Force, as opposed to welfare benefits or support payments.

One of the factors which may weigh against the application of estoppel against the government is the duty of the courts to observe conditions defined by Congress for charging the public treasury. *Schweiker* v. *Hansen*, *supra*. In the petitioner's case, however, all of the conditions defined by Congress for the payment of disability benefits to the petitioner have been satisfied. It is undisputed that the petitioner suffered permanent injuries while on active duty with the United States Armed Forces and he has been awarded partial disability benefits. The only issue relates to the entitlement of petitioner to benefits from the date of his discharge to the date of his application; to bar the petitioner from receiving these benefits which he would have received except for the pattern of misrepresentations made to him by the government would be to frustrate the Congressional purpose in providing for such disability compensation to veterans.

The District Court, in its opinion of June 26, 1981, directly addressed this issue:

> "I am mindful of the duty of federal courts to observe the conditions defined by Congress for charging the public treasury, and where a party not otherwise entitled to a statutory benefit seeks to invoke the estoppel doctrine, courts tread lightly for fear of breaching this duty. *Gressley* v. *Califano*, 609 F.2d 1265, 1267 (7th Cir. 1979). However, some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision-making process that the government may be estopped from disavowing the misstatement. *United States* v. *Wharton*, 514 F.2d at 412, *note* 6. Administrative regularity must sometimes yield to basic notions of fairness."

CONCLUSION

Petitioner's case would represent an appropriate opportunity for this Honorable Court to grant certiorari. Just as government exists to serve the people, there should be remedies under the law to correct mistakes and abuses of the government in dealing with its citizens. The dismissal of the petitioner's cause of action by the Court of Claims was not in accord with the principles expressed in *Schweiker* v. *Hansen*, *supra*, and other lower court decisions to the effect that there must be some circumstances under which the government is obliged under the law to accept responsibility for its mistakes. In the case of the petitioner, there was a pattern of affirmative misconduct on the part of the government, and allowing the petitioner to seek correction of this state of affairs can only vindicate the government's interest in fairness to its veterans.

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IN THE UNITED STATES COURT OF CLAIMS

No 436-81C

GERALD L. ARMSTRONG	)	Military pay; review of
	)	Veterans Administration
	)	decision; equitable
v.	)	estoppel against the
	)	United States; transfer to
THE UNITED STATES	)	District Court.

Wallace D. Prugh, attorney of record, for plaintiff.

Robert Giertz, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Susan Ptacek*, Veterans Administration, and *Captain Thomas J. Fiscus*, United States Air Force, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

ORDER

This military pay case comes before the court on the defendant's motion to dismiss the plaintiff's petition for lack of jurisdiction.

While the plaintiff was a cadet at the United States Air Force Academy, he underwent knee surgery at the Academy Hospital. Although commissioned as an officer in the Air Force after his graduation on June 1, 1977, the plaintiff soon was discharged because of the deterioration of his knees. Plaintiff alleges that he was advised by certain persons within the government, as well as by the Air Force Physical Evaluation Board, that he was ineligible for disability payments because, as a cadet in the Academy, he was not on active duty when the injury occurred. He asserts that, in reliance on this advice, he did not apply to the Veterans Administration ("VA") for disability benefits, but instead filed suit in the United States District Court for the District of Colorado, alleging negligence and carelessness in the

treatment of his knee injury. During the suit, the government admitted that when the plaintiff's knee injury took place, he was on active duty for the purpose of claiming disability benefits.

The plaintiff then amended his complaint to state a cause of action for administrative abuse and equitable estoppel. The government moved to dismiss. The district court held that the plaintiff's amended petition stated a claim within its jurisdiction. The court authorized the plaintiff to apply to the VA. The court retained jurisdiction to ascertain whether the government's actions warranted applying the principle of estoppel, since the applicable statute provides that veterans' benefits may be awarded only from the date of application when the application is filed more than one year following discharge.

The plaintiff filed his benefits application with the VA on July 2, 1981, more than three years after his discharge from the Air Force. The VA found the plaintiff to be 20 percent disabled. In accordance with the applicable statutory limitation that, where an application for disability benefits is received more than one year after discharge, "the effective date of an award based on an original claim, . . . shall not be earlier than the date of receipt of application therefor," (38 U.S.C. § 3010(a) (1976)), the VA awarded the plaintiff benefits effective July 2, 1981.

In his district court suit, the plaintiff sought more than $10,000, an amount reflecting the VA benefits he would have received if he had applied to the VA within a year of his discharge. Since the amount exceeded the district court's jurisdictional limit under the Tucker Act (28 U.S.C. § 1346(a) (2) (1976 & Supp. III 1979)), the court at the plaintiff's request transferred the case to this court pursuant to 28 U.S.C. § 1406(c) (1976).

1. The VA has no choice but to limit the plaintiff's disability benefits to the period beginning on the date on which the plaintiff filed his application for benefits. The statute quoted above unequivocably and explicitly so requires. It provides that where the application is received more than a year after discharge (as the plaintiff's application was), the "effective date of the awarding .... shall not be earlier than the date of receipt of application therefor."

Moreover, to the extent the plaintiff is challenging the VA's refusal to depart from that limitation because of the facts of this case, we would have no jurisdiction to review that claim. 38 U.S.C. 211(a) (1976) would preclude us from reviewing that action. That provision makes decisions of the VA "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . final and conclusive" and provides that no United States court "shall have power or jurisdiction to review any such decision . . . ." *See, e.g., Baker v. United States*, Ct. Cl. No. 145-80C (order of Oct. 17, 1980); *Powers v. United States*, 212 Ct. Cl. 553 (1976).

The plaintiff attempts to avoid the statutory limitation upon payment of benefits for a period before the filing of an application on the theory that the government should be estopped from applying the statute because government officials advised him incorrectly that he was ineligible for Veterans Administration benefits and that in reliance on those statements the plaintiff deferred filing an application with the VA. None of those individuals, however, had any authority to waive the statutory limitations. Indeed, one of them, Mr. Gillikan, was not even a government employee but was an employee of the Disabled American Veterans, a non-government organization.

This aspect of the case is controlled by *Schweiker v. Hansen*, 450 U.S. 785 (1981). In that case, an employee of the Social Security Administration incorrectly advised the respondent there that she was not eligible for benefits and failed to advise her of the necessity of filing a written application as a prerequisite to receiving benefits. The respondent subsequently discovered that she was eligible for benefits and upon filing a written application she began to receive them. She then filed suit seeking retroactive benefits for a period during which her failure to file a written application disqualified her under the regulations. The Court of Appeals for the Second Circuit held that the government employee's conduct estopped the government. The Supreme Court reversed. It stated:

> Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner [the Secretary] the task of providing by regulation the requisite manner of application. A court is

> no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.

Id. at 790.

The present case is an even stronger one than *Hansen* for rejecting estoppel. In *Hansen* the plaintiff sought to estop the government against enforcement of a regulation and the Court held that the government was not estopped from doing so because of its employee's conduct. *A fortiori*, such conduct cannot estop the government from applying an act of Congress. The plaintiff cannot excuse his delay in filing his application for benefits with the VA because of statements by government officials that he was ineligible for the benefits.

2. The plaintiff has conceded in his brief opposition to the defendant's motion to dismiss that the balance of his claim, as set forth in the second claim for relief in the petition, sounds in tort and therefore is not within the jurisdiction of this court under 28 U.S.C. § 1491 (Supp. III 1979). He urges that this part of the case should be transferred back to the district court. The government counters that the district court could not grant the plaintiff relief on his tort claims and that retransferring to the court accordingly would not "be in the interest of justice," which is the standard in 28 U.S.C. § 1506 (1976) governing the transfer of cases by this court to another court.

We agree with the defendant and decline to retransfer the case. The plaintiff's tort claims rest upon two theories, under neither of which the plaintiff could recover under the Federal Tort Claims Act.

First, the plaintiff contends that the government was negligent in its medical treatment of him. As the district court held in this case, this claim is barred by *Feres v. United States*, 340 U.S. 135 (1950), in which the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146.

Second, the plaintiff contends that the statements by government officials that the plaintiff was ineligible for VA benefits

constituted misrepresentations, for which the government is liable. To the extent that this contention is something other than the estoppel claim that we have rejected, it is barred by the exception in the Tort Claims Act for claims arising out of "misrepresentation." 28 U.S.C. 2680(h) (1976). Retransfer of this case to the district court accordingly would not be in the interest of justice. *Cf. Goewey v. United States*, 222 Ct. Cl. 104, 108, 612 F.2d 539, 541 (1979).

Although the defendant captions its motion as one to dismiss, it rests in part upon material outside the pleadings. We therefore treat it as a motion for summary judgment under Rule 101. The motion is granted and the petition is dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

Office - Supreme Court, U.S.
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CLERK

No. 82-220

In the Supreme Court of the United States

OCTOBER TERM, 1982

GERALD L. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Feres v. *United States*, 340 U.S. 135 ..... 2, 3

INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) 4

Pratte v. *NLRB*, 683 F.2d 1038 4

Schweiker v. *Hansen*, 450 U.S. 785 ..... 3, 4, 5

Statutes:

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 3

28 U.S.C. 1406(c) 3

28 U.S.C. 1506 3

28 U.S.C. 2680(h) 3

38 U.S.C. 101(21)(D) 4

38 U.S.C. 211(a) 3

38 U.S.C. 3010(a) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-220

GERALD L. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, because Air Force officials erroneously told him that he was ineligible for disability benefits, the Veterans Administration should be estopped from invoking a statutory provision that precludes benefits from being awarded for the period prior to the date of a veteran's application in cases where an application is not filed within one year of discharge.

1. a. Petitioner sustained a knee injury in an Air Force Academy judo class while he was a cadet (Pet. 3). He was subsequently advised that surgery would be required on both knees to repair the injury and prevent future injuries. Successive operations in July 1976 and January 1977 did not successfully repair his knees (*ibid.*).

Petitioner graduated from the Air Force Academy in June 1977 and was commissioned as a second lieutenant; because of his knee problems, however, he was medically

discharged in January 1978. Petitioner alleges that he was advised by government personnel during discharge proceedings that he was not eligible for disability benefits because cadets were not considered to be on active duty (Pet. 3; Pet. App. A-1). He also claims that he received similar advice from "a person he believed to be supervisor of the Veteran's Administration Office in San Antonio, Texas" (Pet. 3), from the Office of the Air Force Legal Counsel, and from the Air Force Physical Evaluation Board (Pet. 3-4).

Relying on the advice of these various individuals, petitioner did not file a claim for disability benefits with the Veterans Administration but instead filed an action under the Federal Tort Claims Act for damages resulting from alleged negligence in the treatment of his knee injury (Pet. App. A-1 to A-2). The government answered that the tort action was barred under the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), because petitioner was on active duty for disability benefits purposes at the time of his injury (see Pet. App. A-2, A-4). Petitioner thereupon applied for disability benefits with the Veterans Administration in July 1981 and was awarded benefits for a 20% disability. Pursuant to 38 U.S.C. 3010(a), the benefits began to run from the date of his application (Pet. App. A-2).

Petitioner had amended his complaint in the tort action to state a claim for administrative abuse and equitable estoppel based on the misrepresentation alleged to have been made to him concerning his active duty status as a cadet (Pet. App. A-2). He sought as damages the benefits that he would have received from the date of discharge until the date of his application, had he applied for disability benefits within one year of his discharge. Since this amount exceeded $10,000, the district court transferred the case to

the Court of Claims pursuant to 28 U.S.C. 1406(c) (Pet. App. A-2).[1]

b. The Court of Claims granted summary judgment for the government (Pet. App. A-1 to A-5). It held that the Veterans Administration had no authority to award retroactive benefits since 38 U.S.C. 3010(a) expressly provides that, unless a claim is filed within one year of discharge, the effective date for payment of benefits shall be no earlier than "the date of receipt of application" (Pet. App. A-2). The court also held that the Veterans Administration's refusal to depart from this statutory limitation because of the facts of this case was unreviewable under 38 U.S.C. 211(a) (Pet. App. A-3). The court further held that petitioner's effort to avoid the statutory bar on the basis of estoppel was foreclosed by this Court's decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (Pet. App. A-3 to A-4). Finally, the Court of Claims declined to retransfer the tort aspects of petitioner's case to the district court, finding that transfer would not "be in the interest of justice" (28 U.S.C. 1506) (Pet. App. A-4 to A-5). The court explained that petitioner's negligence claim was foreclosed by *Feres* v. *United States, supra* (Pet. App. A-4), and that he could not prevail on a misrepresentation claim because the Federal Tort Claims Act excepts misrepresentation claims (28 U.S.C. 2680(h)) (Pet. App. A-5).

2. The Court of Claims correctly held that petitioner's estoppel claim is governed by this Court's decision in *Schweiker* v. *Hansen, supra*, and further review is unwarranted. This Court has consistently held that equitable estoppel may not be invoked against the government in

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[1]Effective October 1, 1982, the Court of Claims was abolished and its appellate jurisdiction transferred to the new United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

order to avoid conditions imposed by statute or regulation. See *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). Petitioner contends (Pet. 5-10) that this rule is inapplicable here because this case involves "affirmative misconduct" by the government. At the outset, we note that this Court has never applied estoppel against the government and has never stated that even affirmative misconduct would estop the government from enforcing valid laws and regulations. See *Schweiker* v. *Hansen, supra*, 450 U.S. at 788. It simply has not foreclosed the possibility that there could exist in some case affirmative misconduct that would justify an exception to the rule against estoppel.

Assuming arguendo that affirmative misconduct can estop the government, petitioner's claim nevertheless must fail. It is dubious whether he has made out an estoppel claim at all because he has not satisfied the reasonable reliance requirement of such a claim. Petitioner's failure to consult the relevant statute, which clearly establishes that he was on "active duty" at the time of his injury (see 38 U.S.C. 101(21)(D)), renders his reliance on the alleged misstatements unreasonable. See, *e.g.*, *Pratte* v. *NLRB*, 683 F. 2d 1038, 1043-1044 (7th Cir. 1982).

Furthermore, the conduct described here falls far short of affirmative government misconduct. The Court concluded that there was no affirmative misconduct in *Hansen*, and the facts here are different from those in *Hansen* only in the number of persons alleged to have erroneously advised petitioner that he was not eligible for veterans' disability benefits. There is no support for petitioner's suggestion (Pet. 5) of a conspiracy among the various Air Force employees who allegedly misled him; indeed, he does not assert that anyone deliberately intended to deceive him in order to deprive him of his benefits. Moreover, no employee of the Veterans Administration, the agency charged with administering the statute under which petitioner should

have applied for benefits, ever advised petitioner that he was ineligible.[2] As in *Hansen*, the erroneous advice petitioner may have received "did not cause [him] to take action, cf. *Federal Crop Insurance Corp.* v. *Merrill*, [332 U.S. 380 (1947)], or fail to take action, cf. *Montana* v. *Kennedy*, [366 U.S. 308 (1969)], that [he] could not correct at any time." *Schweiker* v. *Hansen, supra*, 450 U.S. at 789. Plainly, there was no affirmative misconduct here that justifies estopping the Veterans Administration from insisting on compliance with the statutory conditions for benefits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[2]Petitioner states (Pet. 3) that he "was told by a person he believed to be supervisor of the Veteran's Administration Office in San Antonio" that he was ineligible for disability benefits. In fact, the record reflects that the individual, Bruce D. Gillikin, has never been employed by the Veterans Administration but is, and was at the time of the events in question, an employee of the Disabled American Veterans, a national service organization chartered by Congress as a non-profit corporation, totally separate from the Veterans Administration or any other federal agency. Affidavit of Bruce D. Gillikin, Appendix 2 to Defendant's Reply Brief filed March 12, 1982, in the Court of Claims.

DOJ-1982-11